



## STATE OF WISCONSIN Division of Hearings and Appeals

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In the Matter of

Office of the Inspector General, Petitioner

vs.

██████████, Respondent

DECISION

Case #: FOF - 171855

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Pursuant to petition filed February 4, 2016, under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the Office of the Inspector General to disqualify ██████████ from receiving FoodShare benefits (FS) one year, a hearing was held on Tuesday, April 19, 2016 at 09:00 AM at , Wisconsin. The hearing was originally scheduled for March 23, 2016 at 8:30 a.m. At that time, the ALJ called the respondent's phone number. An individual answered the phone but spoke no English. A Spanish-speaking employee of DHA spoke with the individual who advised that the respondent was not there and would not be there until the evening. The individual stated that he did not know anything about the hearing. The respondent's address was confirmed.

The Office of Inspector General agreed to re-schedule the hearing and send a new notice to the Petitioner in Spanish. A new notice was issued to the respondent in Spanish informing her of a hearing on April 19, 2016 at 9:00 a.m. None of the information or notices issued to the respondent were returned as undeliverable to DHA or OIG. DHA retained the services of a Spanish interpreter. At the scheduled hearing time on April 19, 2016, the ALJ called the respondent's phone number. There was no answer. The interpreter attempted to call and an individual answered. That individual indicated that the respondent was not there and no one would be participating in the hearing. The ALJ conducted the hearing with OIG.

At approximately 9:30 a.m., the respondent called the ALJ. The ALJ was able to contact the interpreter and the OIG representative but the respondent was disconnected or hung up before the hearing could begin. Numerous attempts were made between 9:30 a.m. – 10:00 a.m. to contact the respondent. She did not answer any of the numerous calls made to the number she had just called from. At 4:00 p.m. on April 19, 2016, the respondent left a voice message for the ALJ but provided no explanation why she was not available at the scheduled hearing time at 9:00 a.m. and no explanation why she disconnected and would not answer the numerous calls made between 9:30 a.m. – 10:00 a.m.

The issue for determination is whether the respondent committed an Intentional Program Violation (IPV).

There appeared at that time the following persons:

**PARTIES IN INTEREST:**

Petitioner:

Office of the Inspector General  
Department of Health Services - OIG  
PO Box 309  
Madison, WI 53701

Respondent: No Appearance by

[REDACTED]  
[REDACTED]  
[REDACTED]

I

**ADMINISTRATIVE LAW JUDGE:**

Debra Bursinger  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. The respondent (CARES # [REDACTED]) is a resident of Milwaukee County who received FS benefits in Milwaukee County from January 12, 2015 through May 1, 2015.
2. From November 3, 2014 – April 1, 2015, the respondent received FS benefits from the State of New Jersey.
3. On January 12, 2015, the respondent submitted an online application for Wisconsin FS benefits. On that date, the respondent contacted the agency with a friend who acted as her interpreter. The agency conducted a phone interview with the respondent through the interpreter. The respondent answered “no” when asked whether she was receiving FS benefits in another state. She reported that she resides on 15<sup>th</sup> Place in Milwaukee but she also reported she is homeless. She reported a household size of one.
4. On January 12, 2015, the agency approved FS benefits for the respondent in the amount of \$125 and issued those benefits to the respondent. Respondent used her Wisconsin FS benefits on January 12, 14, 15, 22, and 23, 2015. The respondent’s next Wisconsin FS issuance date was February 9, 2015 when she received \$194.
5. On January 1, 2015 and February 1, 2015, the respondent received \$194/month in FS benefits on her New Jersey FS card. The respondent made purchases with her New Jersey FS card from January 5, 2015 – January 9, 2015 in New Jersey. She made purchases with her New Jersey FS card in Wisconsin during the period of February, 7 – 9, 2015. She used a total of \$194 of the New Jersey FS benefits issued for January, 2015 and \$184.42 of the New Jersey FS benefits issued for February, 2015. Though the respondent received FS benefits on her New Jersey card for March and April, 2015 in the amount of \$194/month, she did not use any of those benefits.
6. On April 23, 2015, the agency received an alert that the respondent received duplicate benefits from Wisconsin and New Jersey. An overpayment claim of \$707 was established for the period of January 12, 2015 – April 30, 2015.
7. On February 18, 2016, the petitioner prepared an Administrative Disqualification Hearing Notice alleging that the respondent provided false information to receive FS benefits.
8. The respondent failed to appear for the scheduled April 19, 2016 Intentional Program Violation (IPV) hearing and did not provide any good cause for said failure to appear.

## DISCUSSION

An intentional program violation of the FoodShare program occurs when a recipient intentionally does the following:

1. makes a false or misleading statement, or misrepresents, conceals or withholds facts;  
or
2. commits any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any Wisconsin statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of FoodShare benefits or QUEST cards.

*FoodShare Wisconsin Handbook*, § 3.14.1; *see also* 7 C.F.R. § 273.16(c) and Wis. Stat. §§ 946.92(2).

An intentional program violation can be proven by a court order, a diversion agreement entered into with the local district attorney, a waiver of a right to a hearing, or an administrative disqualification hearing, *FoodShare Wisconsin Handbook*, § 3.14.1. The petitioner can disqualify only the individual found to have committed the intentional violation; it cannot disqualify the entire household. Those disqualified on grounds involving the improper transfer of FS benefits are ineligible to participate in the FoodShare program for one year for the first violation, two years for the second violation, and permanently for the third violation. Although other family members cannot be disqualified, their monthly allotments will be reduced unless they agree to make restitution within 30 days of the date that the FS program mails a written demand letter. 7 C.F.R. § 273.16(b).

7 C.F.R. §273.16(e)(4) provides that the hearing shall proceed if the respondent cannot be located or fails to appear without good cause. The respondent did not appear or claim a good cause reason for not attending the hearing. Therefore, I must determine whether the respondent committed an IPV based solely on the evidence that the petitioner presented at hearing.

In order for the petitioner to establish that an FS recipient has committed an IPV, it has the burden to prove two separate elements by clear and convincing evidence. The recipient must have: 1) committed; and 2) intended to commit a program violation per 7 C.F.R. § 273.16(e)(6). In *Kuehn v. Kuehn*, 11 Wis.2d 15 (1959), the court held that:

Defined in terms of quantity of proof, reasonable certitude or reasonable certainty in ordinary civil cases may be attained by or be based on a mere or fair preponderance of the evidence. Such certainty need not necessarily exclude the probability that the contrary conclusion may be true. In fraud cases it has been stated the preponderance of the evidence should be clear and satisfactory to indicate or sustain a greater degree of certitude. Such degree of certitude has also been defined as being produced by clear, satisfactory, and convincing evidence. Such evidence, however, need not eliminate a reasonable doubt that the alternative or opposite conclusion may be true. ...

*Kuehn*, 11 Wis.2d at 26.

*Wisconsin Jury Instruction – Civil 205* is also instructive. It provides:

Clear, satisfactory and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that “yes” should be the answer because of its greater weight and clear convincing power. “Reasonable certainty” means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. This burden of proof is known as the “middle burden.” The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence but may be less than beyond a reasonable doubt.

Further, the *McCormick* treatise states that “it has been persuasively suggested that [the clear and convincing evidence standard of proof] could be more simply and intelligibly translated to the jury if they were instructed that they must be persuaded that the truth of the contention is highly probable.” 2 *McCormick on Evidence* § 340 (John W. Strong gen. ed., 4<sup>th</sup> ed. 1992).

Thus, in order to find that an IPV was committed, the trier of fact must derive from the evidence a firm conviction as to the existence of each of the two elements even though there may be a reasonable doubt as to their existence.

In order to prove the second element, i.e., intention, there must be clear and convincing evidence that the FS recipient intended to commit the IPV. The question of intent is generally one to be determined by the trier of fact. *State v. Lossman*, 118 Wis.2d 526 (1984). There is a general rule that a person is presumed to know and intend the probable and natural consequences of his or her own voluntary words or acts. See, *John F. Jelke Co. v. Beck*, 208 Wis. 650 (1932); 31A C.J.S. Evidence §131. Intention is a subjective state of mind to be determined upon all the facts. *Lecus v. American Mut. Ins. Co. of Boston*, 81 Wis.2d 183 (1977). Thus, there must be clear and convincing evidence that the FS recipient knew that the act or omission was a violation of the FS Program but committed the violation anyway.

The federal regulations at 7 CFR § 273.16(b)(5) state:

Except as provided under paragraph (b)(1)(iii) of this section [which provides for permanently disqualifying an individual for the third occasion of any intentional program violation], an individual found to have made a fraudulent statement or representation with respect to the identity or place of residence of the individual in order to receive multiple food stamp benefits simultaneously shall be ineligible to participate in the Program for a period of 10 years.

The agency asserts that the respondent committed an IPV because she misrepresented that she was not getting FS benefits in another state when she applied for and received benefits in Wisconsin. The agency does not assert or provide any evidence that the respondent made any misrepresentation “with respect to her identity or place of residence” when she applied for benefits in Wisconsin. The evidence establishes that the respondent moved to Wisconsin in or about the time she applied for Wisconsin FS benefits in January, 2015. Though she had received benefits in New Jersey on January 1, 2015, the agency presented no evidence to suggest that the Petitioner was not living in New Jersey on January 1, 2015. There is no evidence presented that she misrepresented her residence in Wisconsin and the evidence establishes that she was present in Wisconsin from January 12, 2015 – April, 2015. There is no evidence with regard to whether she advised the New Jersey agency of her move to Wisconsin. It is not clear if there was an error on the part of the New Jersey agency or error by the respondent in not closing her New Jersey benefits case. Therefore I find insufficient evidence to establish that the respondent made an intentional or fraudulent misrepresentation with respect to her identity or place of residence.

The respondent did make a misrepresentation when she answered “no” to the question of whether she was receiving benefits in another state when she applied for Wisconsin benefits on January 12, 2015. Again, there is no evidence regarding whether the respondent reported her move to the New Jersey agency and it is unclear whether she was aware that she still had an open case in New Jersey. Given the obvious language barrier and the evidence, I do not find that this was an intentional or fraudulent misrepresentation by the respondent.

It is troubling that the respondent used her February benefits from New Jersey when she was aware that she had been approved for Wisconsin benefits. However, the evidence presented shows that she did not use the New Jersey benefits that were issued to her card in March and April, 2015. The evidence is not clear and convincing that the respondent made any fraudulent misrepresentations with an intent to commit a program violation.

Based upon the record before me, I find that the petitioner has not established by clear and convincing evidence that the respondent intentionally violated FS program rules. Thus, the petitioner may not disqualify the respondent from the FS program.

### **CONCLUSIONS OF LAW**

The evidence presented is not clear and convincing evidence that the respondent committed an IPV.

**NOW, THEREFORE, it is ORDERED**

That the petitioner's determination is REVERSED and the petitioner must cease actions to disqualify the respondent from the FS program.

### **REQUEST FOR A REHEARING ON GROUNDS OF GOOD CAUSE FOR FAILURE TO APPEAR**

In instances where the good cause for failure to appear is based upon a showing of non-receipt of the hearing notice, the respondent has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. See 7 C.F.R. sec. 273.16(e)(4). Such a claim should be made in writing to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

### **APPEAL TO COURT**

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing request (if you request one).

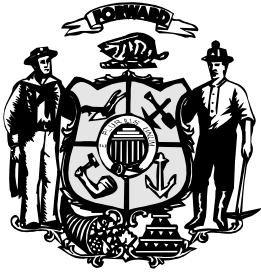
The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Milwaukee,  
Wisconsin, this 26th day of May, 2016

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\sDebra Bursinger  
Administrative Law Judge  
Division of Hearings and Appeals

c: Office of the Inspector General - email  
Public Assistance Collection Unit - email  
Division of Health Care Access and Accountability - email  
[REDACTED] - email



## **State of Wisconsin\DIVISION OF HEARINGS AND APPEALS**

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The preceding decision was sent to the following parties on May 26, 2016.

Office of the Inspector General  
Public Assistance Collection Unit  
Division of Health Care Access and Accountability  
[REDACTED]@wisconsin.gov